IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civ. Action No. 12-00169 (AET) (LHG) **ORAL ARGUMENT REQUESTED**
THIS FILING RELATES TO: STATE OF INDIANA, by Attorney General Greg Zoeller, Plaintiff, v. McWANE INC., SIGMA CORPORATION, and STAR PIPE PRODUCTS, LTD., Defendants.	Civil Action No. 3:12-cv-06667 (AET) (LHG)

STATE OF INDIANA'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiff, the State of Indiana, by Attorney General Greg Zoeller ("Plaintiff" or "Indiana"), hereby responds to Defendant Star Pipe Products, Ltd.'s Motion to Dismiss with Prejudice Count 3 of the Amended Complaint (No. 3:12-cv-06667, Dkt. No. 28) and the Consolidated Motion of Defendants McWane, Inc. and Sigma Corporation to Dismiss the Second Amended Class Action Complaint (No. 3:12-cv-06667, Dkt. No. 29) (collectively, the "Motions").

I. INTRODUCTION

Defendants move to dismiss the Indiana Complaint[1] for failure to plead facts supporting standing or antitrust impact with regard to Indiana's purchases of DIPF. Defendants' arguments are premised almost entirely on assertions of "facts" that are alleged nowhere in the Complaint and are not true. As directed by this Court in its previous decisions addressing Defendants' standing arguments, Indiana alleges that its political subdivisions purchased DIPF (or domestic DIPF), indirectly from a specific Defendant, during the conspiracy periods alleged in the Complaint. *See infra* at 4-5. Star alters these allegations to assert that Indiana's political subdivisions purchased DIPF "only as part 'water infrastructure projects.'" Star Brief at 3.[2] Defendants McWane and Sigma expand on this invented allegation, asserting that Plaintiff "purchased completed waterworks projects," and that "the DIPF was purchased as a small, indivisible component of an overarching, comprehensive contract for a waterworks project." *See*

[1] "Indiana Complaint" or "Complaint" as used herein, refers to the Amended Complaint filed by the State of Indiana on May 9, 2013. Amended Complaint, *State of Indiana v. McWane*, No. 3:12-cv-06667, Dkt. No. 22.

[2] "Star Brief" refers to the Memorandum of Law in Support of Defendant Star Pipe Products, Ltd.'s Motion to Dismiss Count 3 of the Amended Complaint, No. 3:12-cv-06667, Dkt. No. 28-1.

McWane/Sigma Brief at 31-32.[3] As noted above, none of these allegations appear in the Indiana Complaint, nor can they be fairly inferred from the facts that are actually alleged.

Defendants then use these fabricated "facts" as the centerpiece for their motions to dismiss. Relying on cases where indirect purchaser plaintiffs purchased a finished product, one small component of which was the subject of the alleged conspiracy, Defendants claim that Indiana lacks standing to assert claims for its purchases of DIPF.

As discussed below, the decisions cited by Defendants have no bearing on the allegations here, which are that Indiana political subdivisions purchased **DIPF**, not a "completed waterworks project" of which the DIPF was an indivisible component. In any event, it matters not at all whether Indiana cities and towns purchased DIPF as a "stand alone" product or purchased it together with the many other items necessary for the construction of waterworks projects.[4] Either way, as the Complaint alleges, Plaintiff purchased DIPF, the price of which was inflated by Defendants' conspiratorial behavior. Defendants' argument that only "stand alone" purchases are cognizable, and that Indiana's Complaint should be dismissed for failure to allege them, is wrong and must be rejected.[5]

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[3] "McWane/Sigma Brief" refers to the Consolidated Memorandum of Defendants McWane, Inc. and Sigma Corporation in Support of Their Motion to Dismiss the Second Amended Class Action Complaint, No. 3:12-cv-06667, Dkt. No. 29-1.

[4] In fact, many of the purchases of DIPF itemized in the Complaint are what the Defendants would call "stand-alone" purchases" i.e. purchases by a municipal water department to keep items in inventory for repair or replacement projects. To the extent, however, that the purchases of DIPF were in connection with a larger water works project, DIPF is nevertheless separately itemized on invoices along with the other items purchased for the project, and is not an "indivisible component" of an entire water works project purchased by the political subdivision.

[5] Incredibly, Defendants McWane and Sigma assert that in light of this Court's Consolidation Order, it is "unnecessary to respond" to the Indiana Complaint at all, nor is it necessary for this Court to even *consider* it. McWane/Sigma Brief at 38. The Indirect Purchasers, however, cannot and do not assert any claims under Indiana law, nor do they allege facts relating to Indiana's purchases. Moreover, in light of this Court's statement in its Consolidation Order that

By its express text, Indiana antitrust law confers standing to sue on indirect purchaser political subdivisions, through its Attorney General. *See* IND. CODE §§ 24-1-1-5.1, 24-1-1-5.2, 24-1-2-5.1, 24-1-2-7. In light of this express statutory mandate, Defendants are wrong to argue that federal law, rather than Indiana law governs the standing analysis here. In any event, under any applicable standard, Plaintiff has adequately alleged antitrust impact and injury resulting from Defendants' conspiracies.

Defendant Star separately moves to dismiss Count 3 of the Complaint, which alleges a price-fixing conspiracy among all three Defendants commencing in January of 2008 and continuing through June of 2010. On a closer review, however, Star argues that Count 3 should be dismissed only "to the extent that it is based on any allegations of behavior after May 2009." Star Brief at 7. As discussed more fully below, this Court has already held that the facts alleged in the Direct Purchaser Complaint are sufficiently suggestive of agreement to withstand Defendants' motions to dismiss. *See infra* at 16-18. That same conclusion is warranted with respect to the longer conspiracy alleged by Indiana. Indiana has alleged facts suggesting a motive, actions against interest, inappropriate pricing communications and internal documents suggesting the price increases were the result of an agreement. Star's argument that the conspiracy allegations related to conduct after May 2009 are insufficient must therefore be rejected.

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consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties to one suit parties in another," Consolidation Order, No. 12-cv-00169, Dkt No. 119, at 2, Defendants' assertion that the Court need not even *consider* Indiana's Complaint is obviously wrong.

For all of these reasons, as more fully explained below, Plaintiff, the State of Indiana, respectfully requests this Court to deny Defendants' motions to dismiss Indiana's claims.[6]

II. ARGUMENT

A. Legal Standard Governing a Rule 12(b)(6) Motion to Dismiss

The standards for evaluating the sufficiency of a Complaint are well-settled. In deciding a motion to dismiss under Rule 12(b)(6), "[this Court] must consider only those facts alleged in the complaint and accept all of the allegations as true." *Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 350 (3d Cir. 2012) (quoting *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994)). Furthermore, the court must "construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 (3d Cir. 2002); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007)). As shown below, Defendants' Motions are almost entirely premised on so-called "facts" as to Plaintiff's purchases that are not alleged in the Complaint; are not fairly inferred from the Complaint; and are not true. Defendants' "facts" and the faulty legal arguments that they engender, must be rejected.

B. Plaintiff Sufficiently Pled Purchases of DIPF.

In its Opinion dismissing the Indirect Purchaser Complaint, this Court held that in order to allege standing, each indirect purchaser plaintiff was required to plead the following for its purchases of DIPF: (1) the time period in which the purchases were made; (2) which Defendant produced the DIPF purchased by the plaintiff; and (3) whether the purchases of DIPF were

[6] The Defendants also move to Dismiss Count One of the Indiana Complaint, which seeks an injunction section 16 of the Clayton Act. For its response to this portion of Defendants' motion, Indiana incorporates and joins the response filed by the Indirect Purchasers Plaintiffs.

specified as domestic or non-domestic. *See* Opinion, No. 3:12-cv-00169, Dkt. No. 105, at 8-10 (Mar. 18, 2013) (Indirect Purchaser Opinion). This Court's instructions with respect to the required allegations in the Indirect Purchaser Complaint are consistent with its rejection of Defendants' standing challenges to the Direct Purchaser Complaint. There, it held that the Direct Purchaser Plaintiffs' allegations were sufficient because they alleged: "(1) the type of DIPF (domestic or imported) purchased by each plaintiff; (2) from which defendants they purchased DIPF; and (3) the time periods during which each plaintiff made its purchases." Opinion, No. 3:12-cv-00711, Dkt. No. 116, at 15 (Mar. 5, 2013) (Direct Purchaser Opinion) (hereinafter "Direct Opinion").

Indiana has pled each of the facts regarding its political subdivisions' purchases of DIPF required by this Court's previous Orders. *See* Indiana Complaint, at ¶¶ 98-109. For example, as to the City of Bloomington, Plaintiff alleged that: "[1] Bloomington made indirect purchases of domestic DIPF [2] from McWane or a subsidiary [3] in at least, March, June, July, August and October of 2009, April and August of 2010; May through August of 2011; and January April and August of 2012" *See id.* at ¶ 100. Similar specific allegations are made with respect to the purchases of other Indiana political subdivisions. *See id.* at ¶¶ 102-07.

Defendants ignore these allegations and substitute their own—asserting that Plaintiff's purchases of DIPF were "part of a water systems project for which DIPF was just one small component." *See* Star Brief at 4. *See also* McWane/Sigma Brief at 31 ("Here, DIPF is purchased as a small, indivisible component of an overarching comprehensive contract for a water works project, usually after a bidding process for the entire project as a competed whole."). Based on these invented facts, Defendants then argue that Plaintiff lacks standing, relying on cases where indirect purchasers of a finished product containing many pre-assembled parts assert antitrust

claims arising from a conspiracy involving one *component* of the product actually purchased. These cases provide no support for Defendants' motions to dismiss.

Defendants have not and cannot cite a single paragraph in the Indiana Complaint that supports any possible inference that the Indiana political subdivisions purchased a finished product that contained DIPF as a component part, rather than purchased DIPF itself. While Defendants cite to three paragraphs in the Indiana Complaint, each paragraph clearly states that Plaintiff purchased DIPF. *See, e.g.*, Indiana Complaint ¶ 9 ("made numerous purchases of both DIPF and Domestic DIPF"); ¶ 98 ("[p]olitical subdivisions within the State of Indiana have made ***numerous purchases of both DIPF and Domestic DIPF*** from the Defendants during the relevant time periods. . . ."") (emphasis added); ¶ 108 ("[p]olitical subdivisions within the State of Indiana ***made many other purchases of Domestic and non-domestic DIPF*** during the relevant time period for ***use*** in water infrastructure projects") (emphasis added). That fact that Indiana ultimately used the DIPF in the construction of water systems projects, or purchased the DIPF along with other materials also used in the construction of the projects, has no bearing on whether DIPF is a "component," and is irrelevant for purposes of antitrust standing.

The cases cited by Defendants all discuss indirect purchasers of a finished product, such as a refrigerator, where the plaintiffs alleged that one part of the finished product purchased, such as a compressor in the refrigerator, was artificially inflated. *See In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756 (E.D. Mich. Apr. 9, 2013). For example, in *In re Magnesium Oxide Antitrust Litigation*, the indirect purchaser plaintiffs alleged that they purchased cattle feed that contained an indivisible price-fixed component, Magnesium

Oxide. *See* No. 10-cv-5943, 2012 WL 1150123, at **9-10 (D.N.J. Apr. 5, 2012) (noting that "a small percentage of a price-fixed ingredient in a product may not be fatal to . . . standing").[7]

Here, unlike in the component part cases cited by Defendants, the Indiana Complaint does not allege, nor is it factually accurate to state that all of Plaintiff's purchases of DIPF were as part of an entire water works project of which DIPF was a "small, indivisible component." McWane/Sigma Brief at 31.[8] In short, unlike in the cases cited by Defendants, water works projects are not "products," and merely because DIPF was one aspect of a water works project does not make it a component.

Even if (contrary to the allegations of the Complaint) this Court were to view DIPF as a component part of a larger purchase of a water systems project, this would not be grounds for dismissal for lack of antitrust standing. Instead, that factor is but one considered in the standing analysis. *See, e.g.*, *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2013 WL 2456612, at **16-18 (E.D. Mich. June 6, 2013) (holding that end-payor plaintiffs had antitrust standing where they adequately pled that they purchased automobiles containing one allegedly price-fixed component, Automotive Wire Harness Systems, and they otherwise satisfied standing requirements).

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[7] *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 1129 (N.D. Cal. 2008) (plaintiffs alleged they purchased computers that contained a price-fixed DRAM card); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404 (D. Del. 2007) (denying a motion to dismiss where plaintiffs purchased computers and similar products that contained allegedly price-fixed microprocessors); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907 (N.D. Ill. 2009) (plaintiffs alleged that they purchased fertilizer that contained an indivisible and untraceable price-fixed component—potash).

[8] As noted above, many of the purchases of DIPF itemized in the Complaint are what the Defendants would call "stand-alone" purchases" i.e. purchases by the City water department to keep items in inventory for repair or replacement projects. *See supra* n.4.

C. Plaintiff Has Express Statutory Standing and Satisfies the Test for Standing Under Indiana Law.

Indiana antitrust law expressly confers standing on indirect purchaser political subdivisions, through its Attorney General. *See* IND. CODE §§ 24-1-1-5.1, 24-1-1-5.2, 24-1-2-5.1, 24-1-2-7. Even if this express statutory authority were insufficient to confer standing upon Plaintiff, Indiana nevertheless satisfies the test for antitrust standing under Indiana Law set forth in *Citizens National Bank of Grant County v. First National Bank in Marion*, 331 N.E.2d 471 (Ind. App. 1975) (hereinafter "*Citizens National*").[9] In that case, the Indiana Court of Appeals noted that statutory standing under Indiana Code 24-1-2-7 requires "the allegation and proof of an injury to a person's business or property occasioned by anticompetitive conduct." *Id.* at 478. This is similar to the test subsequently set forth by the Supreme Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which requires the court to "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) . . . to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful." *Id.* at 478. The Indiana Supreme Court has not set forth a separate standing requirement for indirect purchasers. Regardless, Plaintiff has satisfied both *Citizens National* and *McCready,* and thus, has standing to pursue its claims.

The first factor examines the "physical and economic nexus between the alleged violation and the harm to the Plaintiff." *McCready*, 457 U.S. at 478; *see also Citizens National*, 331 N.E.2d at 478. Indiana alleges that it directly suffered damages in the form of unlawfully

[9] The court applies substantive state law when a case is before it pursuant to diversity jurisdiction. *Edwards v. Hovensa, LLC*, 497 F.3d 355, 361 (3d Cir. 2007) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

elevated prices paid for DIPF and Domestic DIPF as a result of Defendants' anticompetitive conduct. Indiana Complaint ¶¶ 10, 121-22.

The second factor requires that the plaintiff must be a foreseeable victim of the antitrust violation. *See, e.g.*, *McCready*, 457 U.S. at 479; *Citizens National*, 331 N.E.2d at 478. Plaintiff is clearly a foreseeable, and necessary, victim of the violation. Political subdivisions in Indiana are the end-user consumers of DIPF and Domestic DIPF. Without their purchase and utilization of DIPF in water works projects, there would be no market for DIPF or Domestic DIPF. Thus, Indiana political subdivisions are "predictable and . . . compelling victims of antitrust violations." *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 401 (3d Cir. 2000) (discussing end-users/consumers); *see also* Indiana Complaint ¶¶ 10, 98, 108. The foreseeability of Indiana as a victim is particularly apparent where, as here, a statute specifically allows for claims brought on behalf of political subdivisions injured directly or indirectly by violations of the law. IND. CODE §§ 24-1-1-5.1, 24-1-1-5.2, 24-1-2-5.1, 24-1-2-7. Thus, having statutory authority and having satisfied the standing requirements of *Citizens National* and *McCready*, Indiana has standing to pursue these claims.

D. The Indiana Supreme Court would not Apply the Federal Antitrust Standing Requirements Where the Relevant State Law is not Analogous to Federal Law.

Defendants insist that there are additional standing requirements under federal law that apply to Plaintiff's state law claims. McWane/Sigma Brief at 29-33; Star Brief at 5. Specifically, Defendants argue that the balancing test outlined in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), which is applicable to federal antitrust claims for damages pursuant to Section 4 of the

Clayton Act, also applies to Plaintiff's indirect purchaser claims under state law.[10] The five-factor test outlined in *AGC*, however, does not automatically apply to state law claims.[11] *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1121-24 (N.D. Cal. 2008) ("[I]t is inappropriate to broadly apply the *AGC* test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts."); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007) ("Absent clearer directive from the courts and legislatures of those states, this order declines to hold that *AGC* is the law of those states at this time. . . . The 'favorable citations' and references to federal antitrust standing are not sufficient to mandate that the *AGC* test applies."); *D.R. Ward Construction Co. v. Rohm & Haas Co.*, 470 F. Supp. 2d 485, 496-501 (E.D. Pa. 2006) (analyzing whether *AGC* applies to indirect purchaser claims arising under the antitrust laws of certain states). In fact, some courts have held that *AGC* is not appropriately applied in this context, which involves "claims of price fixing down a chain of distribution, because in the federal context such claims were already barred by *Illinois Brick*." *In re Aftermarket Filters Antitrust Litig.*, No. 08-C-4883, MDL No. 1957, 2009 WL 3754041, **7-8 (N.D. Ill. Nov. 5, 2009)

[10] Defendants cite *Bi-Rite Oil Co. v. Ind. Farm Bur. Coop. Ass'n, Inc.*, 720 F. Supp. 1363 (S.D. Ind. 1989), for the general proposition that Indiana Courts would construe state antitrust law consistently with the federal statutes. In reaching this conclusion, however, the *Bi-Rite* court heavily weighed the fact that the specific provision at issue was "substantially patterned after the federal Sherman Antitrust Act." *Id.* at 1378. That is not the case here, however, as there is no analogous federal provision that allows indirect purchasers to recover damages for antitrust violations.

[11] The *AGC* factors are: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and the defendant's intent to cause the harm; (2) whether the nature of plaintiff's injury is of the type that the antitrust statutes were intended to remedy; (3) the directness or indirectness of the alleged injury; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the danger of complex and/or speculative apportionment of damages. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1165-66 (3d Cir. 1993).

(noting that even defendants recognized that *AGC* has no application to actions brought by direct and indirect purchasers alleging a price-fixing conspiracy in a physical market).[12]

The Indiana Supreme Court has not decided whether Indiana would apply the *AGC* test to determine antitrust standing. If the issue were presented, however, the Indiana Supreme Court would not apply the *AGC* test to indirect purchaser claims brought by the Attorney General pursuant to his explicit statutory authority, if doing so would conflict with the intent of the legislature in enacting the antitrust law. *See Brownsburg Cmty. Sch. Corp. v. Natare Corp.*, 824 N.E.2d 336, 348 (Ind. 2005) (noting that no comity or deference was due to federal law to decide issue of governmental immunity of municipal and local governmental units under state antitrust laws because doing so would conflict with the intentions of the state legislature to provide immunity to governmental entities).

Here, Indiana law provides that the Indiana Attorney General may bring claims on behalf of municipal and local government units, who are injured *directly and indirectly* by violations of the Indiana Antitrust Act. To the extent that the balancing test of *AGC* conflicts with this express statutory mandate, the Indiana Supreme Court would not apply it to Plaintiff's claims, especially where the entities that are statutorily endowed with standing are "creatures of the state"—Indiana political subdivisions and municipalities.[13]

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[12] *AGC* does not apply to Plaintiff's federal claims for injunctive relief, because the Third Circuit has adopted the *McCready* test for determining antitrust standing as to indirect purchasers bringing claims pursuant to Section 16 of the Clayton Act for injunctive relief. *Warfarin*, 214 F.3d at 400-02. For the reasons demonstrated above at pages 7-9, each of these factors has been satisfied, and Indiana has standing to pursue its claims.

[13] "Municipal and local government units, on the other hand, are creatures of the State. As such there is no consideration of comity or deference. The only issue is the intention of the state legislature . . . ." *Brownsburg Cmty. Sch. Corp. v. Natare Corp.*, 824 N.E.2d 336, 348 (Ind. 2005).

E. Even if the Indiana Supreme Court Would Apply the *AGC* Test, Plaintiff Has Satisfied Each of the Factors.

Relying on the false factual premise that Indiana purchased DIPF only "as a small indivisible component of an overarching, comprehensive contract for a water works project," Defendants argue that Indiana fails to satisfy the requirements for antitrust standing outlined in *AGC*. McWane/Sigma Brief at 31, 38. Even if this Court were to apply the *AGC* factors to Plaintiff's claims in this case, an analysis of those factors clearly weighs in favor of the conclusion that Plaintiff has suffered a cognizable antitrust injury and has standing to pursue its claims under the Indiana Antitrust Act.

The first *AGC* factor looks to the causal connection between the violation and the harm, and the defendants' intent to cause harm. *AGC*, 459 U.S. at 537. Plaintiff's Complaint alleges that as a result of Defendants' illegal anticompetitive conduct, political subdivisions have paid more for their purchases of DIPF than they would have in a competitive market. These allegations satisfy the first factor in the *AGC* analysis, and thus support Indiana's standing. Indiana Complaint ¶¶ 10, 110-11, 121-122.

As to the second factor, Indiana's political subdivisions have suffered antitrust injury—having paid inflated prices for DIPF on account of Defendants' wrongful conduct. This is clearly the type of injury Indiana's antitrust statute was designed to remedy and is alleged by Indiana in its Complaint. *AGC*, 459 U.S. at 540. Indeed, the Indiana Antitrust Act specifically confers standing upon the Attorney General to bring claims on behalf of Indiana political subdivisions that were injured both directly and indirectly as a result of a defendant's violation of the Act. *See* IND. CODE §§ 24-1-1-5.1, 24-1-1-5.2, 24-1-2-5.1, 24-1-2-7; *see also D.R. Ward Construction*, 470 F. Supp. 2d at 502-03 (statutes that allow indirect purchasers to proceed on

damages claims under the relevant antitrust law fulfill this factor). This factor, therefore, likewise supports standing.

The third and fourth *AGC* factors examine the directness of the injury, and whether there are more direct victims of the conspiracy. *AGC*, 459 U.S. at 540-42. Indiana alleges that it was directly and proximately injured by the conspiracy alleged in the Complaint, as the overcharges were passed along to the end-user/consumers. Indiana Complaint ¶ 10; *see also Sheet Metal Workers Nat'l Health Fund*, No. 07-cv-5295, 2008 WL 3833577, at *12 (D.N.J. Aug. 13, 2008) (third-party payor plaintiffs had standing). In *D.R. Ward Construction*, the court examined these factors in the indirect purchaser context and noted that they "lose[] relevance when applied to antitrust statutes that permit indirect purchaser claims." 470 F. Supp. 2d at 503. There, the court noted that the proper inquiry is whether there are other *indirect purchasers* who are more directly linked to the price-fixing conspiracy. *Id.* at 504 (dismissal not warranted where no showing of a more direct injury). Indiana has alleged that it, as the end-user/consumer, ultimately paid all or most of the price increases that resulted from the anticompetitive behavior of Defendants. Indiana Complaint ¶ 10. Therefore, this factor also directly supports Plaintiff's standing.

The fifth factor looks to the speculative nature and complexity of apportionment of damages. *AGC*, 459 U.S. at 543-44. Defendants argue that there is a high potential for duplicative recovery or complex apportionment of damages, but provide no explanation as to why this is so. McWane Motion at 32. Plaintiff has sufficiently pled that all or most of the overcharges were passed through to the end-user/consumers—political subdivisions. Indiana Complaint ¶ 10. Defendants have not provided a single reason why apportioning damages would be complex where, as here, Plaintiff suffered all or most of the injury. *See D.R. Ward Construction*, 470 F. Supp. 2d at 504 (noting that the defendants failed to articulate with

specificity why the court would lack the capacity to resolve damages issues and refusing to dismiss the claims on this ground); *see also California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989) (discounting this factor in the indirect purchaser context and noting that as state law is not preempted by federal antitrust law, factors of duplicative recovery should not bar a plaintiff from bringing a claim); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 410 (D. Del. 2007) (concluding that *AGC* factors three through five "carry less weight in the standing analysis" in jurisdictions that allow indirect purchasers to seek relief).

Defendants base their argument that Plaintiff lacks standing under *AGC* on the irrelevant observation that "plaintiffs who purchased completed waterworks are not 'consumers or competitors' in the market for DIPF; they do not purchase DIPF, but rather contract for the entire project of which DIPF is but a small component." McWane/Sigma Brief at 32; *see also* Star Brief at 4 ("The State of Indiana has failed to alleged facts showing the effect of any alleged conduct by Defendants in the DIPF market on the price of such consolidated systems or projects, and therefore has failed to show antitrust standing."). But Indiana has not alleged that it purchased "completed waterworks" or a "consolidated system." Plaintiff alleges that its political subdivisions and municipalities **purchased DIPF**, the price of which was inflated by the conspiracy alleged in the Complaint and passed entirely or mostly on to them. As purchasers of DIPF, Indiana political subdivisions are "consumers" in the market restrained by the antitrust violation and thus participants in that market. Indiana, therefore, clearly has standing to assert these claims.

The cases upon which Defendants rely are inapposite, as each involved an indirect purchase of a product other than the one alleged to have been the subject of the price-fixing conspiracy. *Cf. Refrigerant Compressors Antitrust Litig.*, 2013 WL 1431756, at *12 (plaintiffs,

who purchased refrigerators not compressors, acknowledge that they are not participants in the market for the price-fixed product); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129 (N.D. Cal. 2008) (plaintiffs were not participants in the relevant market for DRAM, instead they were participants in the market for finished products, computers); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 939-40 (N.D. Ill. 2009) (plaintiffs were purchasers of fertilizer and the allegedly price-fixed component, potash, was an indistinguishable and untraceable component, and thus they were not participants in the relevant market).

In short, Indiana has standing to bring its claims under Indiana Code §§ 24-1-1-5.1, 24-1-1-5.2, 24-1-2-5.1, 24-1-2-7 and Section 4 of the Clayton Act. Defendants' motions to dismiss for lack of antitrust standing must be denied.

F. Plaintiff Has Adequately Alleged an Ongoing Conspiracy to Fix Prices through June of 2010.

Plaintiff has alleged that Defendants engaged in an illegal price-fixing conspiracy, beginning in January of 2008 and continuing through at least June 2010. Indiana Complaint at ¶¶ 41-71. In its Motion to Dismiss, Star[14] argues that Plaintiff has failed to allege facts, such as "plus factors," sufficient to support the inference that Defendants' price-fixing conspiracy extended beyond May 2009. *See* Star Brief at 5-7. This Court has already considered and rejected a similar argument in its Opinion denying Defendants' Motion to Dismiss the Direct Purchaser action. Rejection of Star's arguments is warranted here as well.

In *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court held that when a Plaintiff bases a Sherman Act § 1 claim on allegations of parallel conduct, those allegations "must be placed in a context that raises a suggestion of a preceding agreement." 550 U.S. 544,

[14] McWane and Sigma have not moved to dismiss on this basis.

557 (2007). As this Court stated it its Direct Opinion, "[i]n other words, plaintiffs alleging parallel conduct must allege 'plus factors' that suggest that the conduct is the subject of preceding agreement." Direct Opinion at 18. The Third Circuit has identified a non-exhaustive list of such "plus factors" including "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 321-22 (3d Cir. 2010) (internal quotations omitted); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011). The Court may also consider the existence of a parallel governmental investigation as a plus factor. *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 632 (E.D. Pa. 2010) (citing *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 324 (2d Cir. 2010) (concluding that allegation of pending investigation by New York State Attorney General, and two separate investigations by the Department of Justice, were part of context raising a plausible suggestion of illegal agreement)).

In the Direct Opinion, this Court evaluated each of the "plus factors" alleged by the Direct Purchaser Plaintiffs, finding them sufficient, considered collectively, to plausibly allege the existence of an agreement. Direct Opinion at 19-24. As to the first plus factor, this Court held that the Direct Purchaser Plaintiffs adequately pled motive; that is, facts suggesting that the industry is conducive to collusion. *Id*. at 19-20. Indiana's allegations are nearly identical to those found sufficient in the Direct Purchaser Complaint.[15] Star offers no argument why the Court should hold differently here. *See generally* Star Motion at 6.

[15] *Compare* Indiana Complaint ¶¶ 35-40, 56-57 *with* Consolidated Amended Complaint and Demand for Trial by Jury, No. 3:12-cv-00711, Dkt. No. 78, at ¶¶ 100-105 (hereinafter "Direct Purchaser Complaint").

As to the second "plus factor"—actions against interest, this Court held that the Direct Purchaser Plaintiffs' allegations of rising prices in a falling market "was against self-interest, or behavior that would not have occurred in a competitive market." Direct Opinion at 21. *See also* Direct Purchaser Complaint ¶ 92. Indiana makes similar allegations; specifically that throughout the conspiracy period, despite a notable downturn in the United States economy and decreased demand, DIPF prices in the United States increased sharply. Indiana Complaint ¶ 71.

While Star argues that "follow the leader" pricing is rational business behavior that cannot support an inference of conspiracy, this Court has already rejected that argument, noting that it fails to explain why McWane, the price leader, "decided to increase prices in the first place." *See* Direct Opinion at 21-22 (allegations demonstrating that McWane's decision to raise prices despite a decrease in demand and a downturn in the economy, and Star's and Sigma's decisions to follow, were sufficient to show actions against interest). Again, Star offers no argument as to why this Court should rule differently here. *See generally* Star Motion at 5-7. Plaintiff Indiana has adequately pled facts showing Defendants acted contrary to their self interest.

The third "plus factor" looks for "non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Insurance Brokerage*, 618 F.3d at 322. This Court has already determined that this plus factor was sufficiently alleged—given various communications, public and private, and the existence of the DIFRA information exchange. *See* Direct Opinion, at 22-23. Indiana has alleged that the Defendants' matching June 2010 price increases, and their communications by means of public letters to their customers

beforehand, were a continuation of the same conspiracy, hatched in January 2008, to unlawfully maximize their profits.

In addition to the facts described above, Indiana alleges other facts suggesting that the June 2010 price increases, like the earlier parallel price increases, were the result of Defendants' continuing agreement. Plaintiff outlined several public communications beginning with Star signaling a price increase, a coordinated response by Defendants McWane and Sigma, and parallel increases—all while demand was falling. Indiana Complaint at ¶¶ 63-71. Plaintiff also describes an internal document authored by Sigma that suggests that the successful price increase was in accordance with a "game plan" that "we stuck to." Indiana Complaint ¶ 70. These allegations, considered together with all of the other allegations in the Complaint, are sufficient at least suggest a continuing agreement to fix prices up through June of 2010. *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d at 630 (citing *In re Aftermarket Filters Antitrust Litig.*, No. 08-cv-4883, 2009 WL 3754041, at *3 (N.D. Ill. Nov. 5, 2009) ("[D]efendants may not 'cherry pick' specific allegations in the complaint that might be insufficient standing alone.")). *See also* Direct Opinion at 23 ("looking at all of the evidence in sum, the Court is inclined to agree that the Direct Purchaser Plaintiffs have alleged a factual enhancement that nudges their claim across the line from the conceivable to the plausible.") Defendant Star's Motion to Dismiss, therefore, must be denied.

III. CONCLUSION

For the reasons stated above, the State of Indiana, by Attorney General Greg Zoeller, hereby respectfully requests that the Court deny Defendant Star Pipe Products, Ltd.'s Motion to Dismiss with Prejudice Count 3 of the Amended Complaint and the Consolidated Motion of Defendants McWane, Inc. and Sigma Corporation to Dismiss the Second Amended Class Action Complaint.

Respectfully submitted,

Dated: July 22, 2013

/s/ Bryan L. Clobes

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CERTIFICATE OF SERVICE

I, Bryan L. Clobes, hereby certify that on July 22, 2013, I caused a true and correct copy of the State of Indiana's Response in Opposition to Defendants' Motions to Dismiss to be served on all counsel entitled to receive service in this action by ECF.

/s/Bryan L. Clobes
Bryan L. Clobes